



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**New Special Experimental Project (SEP-16) to Evaluate Proposals for Delegation of Certain Program-wide FHWA Responsibilities to States**

**AGENCY:** Federal Highway Administration (FHWA), U.S Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** The FHWA is establishing a new Special Experimental Project (SEP-16) to test and evaluate the delegation of program-level responsibilities of the Federal-aid highway program (FAHP) to States, including the appropriate steps States should take to request to exercise delegated authority. The FHWA anticipates there is interest in State assumption of program-level actions for approval of design standards, noise policies, preventative maintenance programs, and real property acquisitions and disposals. The term “program-level actions” in this context means decisions that apply generally to projects in a State and broadly affect the implementation of the Federal-aid highway program in the State, but excludes Federal decisions relating to eligibility, obligation, reimbursement, authorization, and compliance.

**DATES:** This new SEP-16 project is being initiated on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** For technical information: Cindi Ptak, Office of Innovative Program Delivery (HIN), (202) 366-8408; for legal information: Janet Myers, Office of the Chief Counsel (HCC), (202) 366-2019, 1200

New Jersey Avenue, SE, Washington, DC 20590. Office hours are from 8:00 a.m. to 4:30 p.m., ET, Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access**

An electronic copy of this notice may be downloaded from the Federal Register's home page at: <http://www.archives.gov>; the Government Publishing Office's database at: <https://www.gpo.gov/fdyss/>; or the specific docket page at: [www.regulations.gov](http://www.regulations.gov).

### **Background**

The Fixing America's Surface Transportation (FAST) Act (Pub. L. 114-94) builds on the authorities and requirements in earlier legislation to promote the transition from FHWA project-level "full-oversight" of the FAHP to a risk-based approach to FHWA oversight activities. The FHWA's use of a risk-based approach to stewardship and oversight is intended to optimize the successful delivery of projects and to ensure compliance with Federal requirements by focusing FHWA resources most efficiently and effectively.

Unless authorized by law, FHWA may not delegate or assign its decision-making responsibilities to a State department of transportation (State DOT). Section 106(c) of Title 23, United States Code (U.S.C.), authorizes States to assume project responsibilities for design, plans, specifications, estimates, contract awards, and inspections for projects that receive funding under Title 23, U.S.C., and are on the National Highway System

(NHS), including projects on the Interstate System. The States may assume these responsibilities unless FHWA, acting under a delegation of authority from the Secretary, determines that the assumption is not appropriate (23 U.S.C. 106(c)(1)). For non-NHS projects, States must assume such responsibilities (23 U.S.C. 106(c)(2)).

Section 1316(a) of the FAST Act directs the Secretary of Transportation to use the authority under 23 U.S.C. 106(c) to the maximum extent practicable to allow a State to assume the responsibilities described in 23 U.S.C. 106(c) on both a project-specific and a programmatic basis. Section 1316 of the FAST Act seeks to expand the use of the 23 U.S.C. 106(c) authority for State assumption of responsibilities. State assumption of certain responsibilities is part of the transition to risk-based oversight of the FAHP. To implement section 1316 of the FAST Act, FHWA published a Federal Register notice soliciting feedback from States and other stakeholders on additional project-level authorities to assume under Title 23.<sup>1</sup> The responses received indicated an interest in State assumption of program-level actions for approval of design standards, noise policies, preventative maintenance programs, and utility procedures, as well as some areas of real estate acquisition. Some responses requested authority in areas that FHWA has determined already are within the 23 U.S.C. 106(c) assumption authority.

The FHWA is initiating a new SEP-16 pursuant to authority granted to the Secretary in 23 U.S.C. 502(b) to evaluate potential effects of State assumption of

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<sup>1</sup> 81 FR 59715 (August 30, 2016).

program-level FAHP responsibilities that are not currently assumable. The experimental authority may be used to test deviations from Title 23 statutory, regulatory, or policy provisions, provided that the experimental features are consistent with the overall purpose and intent of the underlying statute, regulation, or policy being tested. Actions explicitly prohibited by statute cannot be the subject of a SEP-16 experiment. The experiment must be consistent with other Federal laws that apply to Title 23 funded activities. For example, the recording statute, 31 U.S.C. 1501, and the Antideficiency Act (31 U.S.C. 1341(a)(1)(A)), vest the responsibility to record obligations of the Federal Government with the Federal agency responsible for administering the Federal assistance program. The FHWA is establishing this SEP-16 to consider program-level authorities (as opposed to project-level actions) States may want to assume. The term “program-level authority” in this context means decisions that apply generally to projects in a State and broadly affect the Federal-aid system in the State, but excludes Federal decisions relating to eligibility, obligation, reimbursement, authorization, and compliance.

This SEP-16 is intended to allow States to propose the assumption of Title 23 program-level responsibilities provided they can demonstrate they have, or can reasonably put in place, the necessary laws, regulations, controls, and resources to take on the Federal role. Because States already have experience with project-level assumptions under 23 U.S.C. 106(c), FHWA anticipates initially receiving proposals for program-level authority affecting these types of areas.

This SEP-16 will allow FHWA to understand the implications of delegation of program-wide decisions in various program areas. The lessons learned from SEP-16 will aid FHWA in developing comprehensive policies and inform stakeholders if the delegation of specific program-level authorities, or other discretionary authorities established in Title 23, is appropriate.

To facilitate public access to SEP-16 information, all SEP-16 proposals, workplans, and reports will be posted on a public facing Website.

### **Solicitation of Letters of Interest**

This notice announces SEP-16 and requests Letters of Interest. Entities eligible to submit letters (“Applicants”) are State DOTs as defined in 23 U.S.C. 101. Letters of Interest, which should be submitted to the appropriate FHWA Division Office, initiate the application process described below. The Letter of Interest should include a high-level description of the Applicant’s proposal, reasons for wanting to assume the program-level authority, and the anticipated resulting improvements to program delivery. Ideally, the Applicant will quantify the resulting improvements in terms of project time and/or cost savings. The Applicant should include enough detail to allow FHWA to determine how the proposal deviates from current law (including regulations) and practice, and how the actions covered by the proposal are addressed in current policy. The Letter of Interest should reference the Title 23 program and the specific legal authority(ies) being requested for delegation. Further, the Applicant should provide specific examples that

demonstrate experience with project-level delegation in the affected program area(s), if applicable, as well as the level of collaboration conducted so far with relevant FHWA Division or Program Offices about the proposal.

### **Application Process**

The application process is three-tiered with each step developing more specifics of the proposed program-level assumption(s) for FHWA consideration and feedback.

The FHWA will evaluate each step to determine whether a proposal falls within the scope of section 502(b) and is appropriate for this experimental process before inviting and working with an Applicant to proceed to the next step for more detailed proposal development.

The first step in the application process is the Letter of Interest described above. The FHWA will acknowledge receipt of the Letter of Interest and provide an anticipated timeframe for initially evaluating the proposal and providing a formal response. After review of the proposal, FHWA will provide a formal response that will either request the Applicant to proceed with submitting a Concept Paper, or provide FHWA's explanation for not advancing the proposal.

If a Concept Paper is requested, the Applicant should submit to the appropriate FHWA Division Office a narrative further detailing the Applicant's proposal. This Concept Paper should not exceed 5 pages and be formatted single-spaced, using a standard 12-point font with 1-inch margins. Charts, tables, and other items may also be

submitted as attachments to supplement the narrative and do not count toward the five-page limit. The Concept Paper should demonstrate that the State has the necessary laws, regulations, controls, and resources in place to assume the Federal role for the program-level responsibilities requested. If applicable, the Applicant may use experience with assumption of project-level authorities to demonstrate readiness to assume program-level responsibilities. If any necessary piece is missing, the Applicant should outline a plan and timeline anticipated to put pieces in place. In addition, the Concept Paper should detail supporting analysis for the anticipated program delivery improvements and consider a risk assessment of the expected impact the assumption of authority may have on the State's program – specifically on resources, processes, and stakeholders – and include measures the State would use to ensure the responsibilities are carried out in accordance with Federal requirements. The Concept Paper should also summarize any preparation the Applicant may need to make if the experiment is approved and the time necessary for that preparation (e.g., provide training for staff; make needed changes to procedures, organization charts, etc.). The FHWA will evaluate the Concept Paper, and either request the Applicant to proceed to the Detailed Proposal stage, or provide an explanation for not advancing the request.

Since the requirements for the Detailed Proposal will vary depending on the complexity of the proposed program assumption and the results of FHWA's evaluation of the Concept Paper, the appropriate FHWA Division will coordinate with the Applicant in

preparing the Detailed Proposal. At a minimum, the Applicant's Detailed Proposal should: 1) propose a duration for conducting the experiment, including a timeline for any transition activities; 2) identify key personnel and contacts with proposed roles and responsibilities; and 3) recommend an Evaluation Plan with reporting mechanisms, performance measures, goals, and other evaluation criteria, and frequency of reviews. To provide consistency among the SEP-16 experiments, FHWA will provide the Applicant certain performance measures and evaluation criteria common to all SEP-16 Evaluation Plans.

Should FHWA decide to proceed with the experiment, FHWA and the Applicant will enter into a memorandum of understanding and develop a workplan for the experiment.

## **Conclusion**

The FHWA is committed to continuing its transition to a risk-based approach to stewardship and oversight of the FAHP. To this end, SEP-16 is designed to provide FHWA with a better understanding of the implications of allowing States to assume program-level authorities in various program areas. This notice announces the SEP-16 and identifies the process for States to apply to assume program-level responsibilities for the FAHP in their States.

(Authority: 23 U.S.C. 315 and 502).

Issued in Washington, DC on September 11, 2018.

**Brandye L. Hendrickson,**

*Deputy Administrator,*

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